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AZ CORP COMMISSION
DOCUMENT CONTROL7 *Attorneys for Shughart Thomson & Kilroy, P.C. and*
8 *Michael Glaser*

9 Edward F. Novak (#006092)

BEFORE THE ARIZONA CORPORATION COMMISSION

10 COMMISSIONERS

11 MARC SPITZER, Chairman

12 WILLIAM A. MUNDELL

13 JEFF HATCH-MILLER

14 KRISTIN K. MAYES

15 UTILITIES DIVISION STAFF,

16 Complaint,

17 vs.

18 LIVEWIRENET OF ARIZONA, LLC, THE PHONE
19 COMPANY MANAGEMENT GROUP, LLC; THE
20 PHONE COMPANY OF ARIZONA JOINT
21 VENTURE d/b/a THE PHONE COMPANY OF
22 ARIZONA; ON SYSTEMS TECHNOLOGY, LLC,
23 and its principals, TIM WETHERALD, FRANK
24 TRICAMO AND DAVID STAFFORD JOHNSON;
25 THE PHONE COMPANY OF ARIZONA, LLP and
26 its members,

Respondents.

IN THE MATTER OF THE PHONE COMPANY
OF ARIZONA JOINT VENTURE d/b/a THE
PHONE COMPANY OF ARIZONA'S
APPLICATION FOR CERTIFICATE OF
CONVENIENCE AND NECESSITY TO PROVIDE
INTRASTATE TELECOMMUNICATIONS
SERVICE AS A LOCAL AND LONG DISTANCE
RESELLER AND ALTERNATIVE OPERATOR
SERVICE.

DOCKET NO. T-03889A-02-0796

DOCKET NO. T-04125A-02-0796

DOCKET NO. T-04125A-02-0577

Arizona Corporation Commission

DOCKETED

APR 30 2004

DOCKETED BY

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1 IN THE MATTER OF THE APPLICATION OF
2 THE PHONE COMPANY MANAGEMENT
3 GROUP, LLC, f/k/a LIVEWIRENET OF
ARIZONA, LLC TO DISCONTINUE LOCAL
EXCHANGE SERVICE.

DOCKET NO. T-03889A-02-0578

4 IN THE MATTER OF THE APPLICATION OF
5 THE PHONE COMPANY MANAGEMENT
6 GROUP, LLC FOR CANCELLATION OF
FACILITIES BASED AND RESOLD LOCAL
EXCHANGE SERVICES.

DOCKET NO. T-03889A-03-0152

7 IN THE MATTER OF THE APPLICATION OF
8 THE PHONE COMPANY MANAGEMENT
9 GROUP, LLC d/b/a THE PHONE COMPANY FOR
THE CANCELLATION OF ITS CERTIFICATE OF
CONVENIENCE AND NECESSITY.

DOCKET NO. T-03889A-03-0202

DECISION NO. _____

11 **EXCEPTIONS TO THE RECOMMENDATION**
12 **OF ADMINISTRATIVE LAW JUDGE PHILIP DION**

13 The Arizona Corporation Commission ("Commission") hearing officer in this matter,
14 Administrative Law Judge Philip Dion III, has recommended Findings of Fact in Paragraphs 70,
15 71 and 72 regarding attorney Michael Glaser of Shughart Thompson Kilroy, former counsel to On
16 Systems Technology, LLC, The Phone Company Management Group, LLC, Tim Wetherald,
17 David S. Johnson and Frank Tricamo. Judge Dion has also proposed that the Commission enter
18 an Order revoking the pro hac vice status of Michael L. Glaser and mailing a copy of the Arizona
19 Corporation Commission's Decision to the Colorado State Bar and the State Bar of Arizona. Mr.
20 Glaser takes exception to the Findings of Fact and the proposed Order.

1 RESPECTFULLY SUBMITTED this 30 day of April, 2004.

2 QUARLES & BRADY STREICH LANG LLP
3 Renaissance One
4 Two North Central Avenue
5 Phoenix, AZ 85004-2391

6 By 
7 Edward F. Novak

8 *Attorneys for Shughart Thomson & Kilroy, P.C. and*
9 *Michael Glaser*

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **Mr. Glaser's Representation of Mr. Tricamo**

12 Michael L. Glaser ("Glaser") was retained by Tim Wetherald to represent The Phone
13 Company Management Group LLC ("PCMG"), ON Systems Technology LLC ("ON Systems")
14 and its principals Tim Wetherald, Frank Tricamo and David Johnson in connection with the
15 docket matters presently before the Commission.¹ As with most corporate entity representations,
16 the majority of Mr. Glaser's contacts were with one individual. In this instance that person is Tim
17 Wetherald. At the end of January 2003, Mr. Glaser filed an appearance along with a motion to
18 appear pro hac vice in these proceedings.

19 Prior to filing his appearance Mr. Glaser had no direct contact with Mr. Tricamo.
20 However, Mr. Glaser had Mr. Wetherald's assurances concerning the global representation of the
21 corporate entities and the three principals of On Systems.

22 Mr. Tricamo denies that he knew of the existence of the Commission's complaint or Mr.
23 Glaser's representation. Mr. Tricamo further advised the Commission that he had no knowledge

24 ¹ Tricamo and Johnson were apparently named by Commission staff in their representative capacity. In the
25 Complaint and the Amended Complaint there are no allegations regarding substantive conduct by either Tricamo or
26 Johnson. This is logical given the Commission's jurisdiction over public service corporations including
telecommunication corporations and not individuals for purposes of the relief sought by Commission staff under
A.R.S. §§ 40-202, 203, 321 and 322.

1 of the pendency of a "regulatory case." These denials are contained in an undated letter to the
2 Commission. *Undated letter to Michael Glaser from Frank Tricamo, Docketed on June 17, 2003.*

3 To the contrary, Mr. Wetherald states in an affidavit that Mr. Tricamo had knowledge of
4 the complaint and discussed the complaint with Mr. Wetherald. Mr. Wetherald also states in his
5 affidavit that he advised Mr. Tricamo that counsel would be retained to file an answer on behalf
6 of ON Systems, PCMG, David Johnson, Tim Wetherald and Frank Tricamo. *Affidavit of Tim*
7 *Wetherald dated October 6, 2003, attached as Exhibit E to Shughart Thompson Kilroy PC's*
8 *Renewed Motion to Withdraw, Docketed on October 10, 2003.*

9 The Hearing Officer states at Paragraph 63 of the Findings of Fact that

10 Mr. Wetherald was the managing member of On Systems and
11 PCMG d/b/a PCA, and had actual control of all of the management
12 decisions of On Systems and PCMG d/b/a PCA during the time
13 frames alleged in the Amended Complaint. Further, Mr. Wetherald
14 was the majority owner of On Systems and PCMG d/b/a PCA
during the same period of time. . . . Although On Systems and
PCMG are registered as Limited Liability Corporations in Arizona,
the reality is that those companies were essentially an extension of
Mr. Wetherald.

15 Thus, it would appear from the proposed findings in Paragraph 63 that Judge Dion agrees that Mr.
16 Wetherald acted as the agent for On Systems and PCMG. As such, Mr. Wetherald had the
17 apparent authority to authorize representation for the entities and their principle members, Frank
18 Tricamo and David Johnson.²

19 Apparently, as well, Judge Dion seeks to have the Commission accept the unsworn
20 statements in Frank Tricamo's letter over the sworn affidavit of Mr. Wetherald regarding the
21 question of Mr. Tricamo's knowledge of the Complaint and these proceedings. Mr. Glaser
22 submits that that is an unreasonable position to take and absent other evidence in the record, the
23 sworn affidavit of Mr. Wetherald should control.

24 Thus, when you consider Mr. Wetherald's affidavit, Mr. Glaser's conduct is not

25 _____
26 ² Again, this is consistent with the lack of substantive allegations in either complaint against Tricamo or Johnson.
They were named in their representative capacity as members of the public service corporation, On Systems.

1 unreasonable. Mr. Glaser had good reason to believe he was authorized to represent Mr. Tricamo
2 in the Commission proceedings. Mr. Glaser also had good reason to believe that his
3 communications with Mr. Wetherald were being forwarded to Mr. Tricamo including a copy of
4 Mr. Glaser's Motion to Withdraw.

5 The Commission should not accept the proposed findings in Paragraph 70. Further it
6 should not base its Order on those proposed findings. A revised Paragraph 70 is attached as
7 Exhibit A.

8 **Mr. Glaser Should Have Attended The April 15 Pre-Hearing**

9 In Paragraph 71 of the proposed Findings of Fact, Judge Dion finds as "unacceptable" Mr.
10 Glaser's failure to appear for a hearing set on April 15, 2003. Judge Dion does not include in his
11 proposed Findings of Fact that he was advised by Mr. Glaser prior to April 15, 2003 that Mr.
12 Glaser might be required to withdraw and that Mr. Glaser would not appear on April 15, 2003.
13 *Transcript of June 5, 2003 Pre-Hearing at p. 16.* Judge Dion does include the fact that on April
14 14, 2003, Mr. Glaser filed a Motion to Withdraw.

15 While Mr. Glaser did not appear on April 15, Mr. Glaser did appear at the Commission on
16 June 5, 2003 for a further Pre-Hearing in these matters. Mr. Glaser told Judge Dion at the pre-
17 hearing on June 5, 2003 that his representation of PCMG, On Systems and its principals
18 Wetherald, Johnson and Tricamo had been terminated by Wetherald and that Mr. Glaser was
19 instructed by Mr. Wetherald not to appear at the April 15 pre-hearing.

20 Mr. Glaser acknowledges that despite the instruction from Wetherald not to appear and
21 despite the fact that Mr. Glaser's representation of the clients had been terminated, he should have
22 appeared on April 15, 2003. Mr. Glaser argues that under the circumstances his failure to appear
23 should not give rise to a revocation of his pro hac vice status or the forwarding of the
24 Commission's Decision to Bar authorities. Mr. Glaser, following April 15, 2003, complied with
25 Judge Dion's orders, as he had done prior to April 15, 2003.
26

1 If the Commission has adopted a policy relating to the treatment of pro hac vice
2 appearances, that policy is not evident in the rules, regulations or public pronouncements of the
3 Commission. There is no evidence in the record of these dockets suggesting that in other matters
4 a failure to appear has been met with the revocation of pro hac vice status and a report to Bar
5 authorities. Mr. Glaser believes that, absent such evidence, the proposed remedy is too harsh and
6 the Commission should reject it.

7 Paragraph 71 also cites Mr. Glaser's "... ongoing failure to comply with Commission
8 orders ..." Mr. Glaser disobeyed no other Commission order. He was unable to get Mr.
9 Wetherald to comply with discovery requests, but, as discussed below, this is not an "ongoing
10 failure" by Mr. Glaser. Attached as Exhibit B is a proposed revision to Paragraph 71.

11 **Mr. Glaser Should Not Be Punished For His Client's Failure to Comply With "Discovery**
12 **Requests and Commission Orders."**

13 The third basis upon which Judge Dion recommends the revocation of Mr. Glaser's pro
14 hac vice status is found in Paragraph 72 of the Proposed Findings of Fact. Here the
15 Administrative Law Judge cites "... Mr. Glaser and his clients' failure to comply with discovery
16 requests and Commission orders ..." A lawyer is not responsible for the client's failure to
17 produce discovery. The fact that PCMG, On Systems and Wetherald refused to produce
18 documents ordered by the Commission was and remains beyond the ability of Mr. Glaser to
19 remedy.³ There is no evidence in the record to suggest that Mr. Glaser assisted or advised Mr.
20 Wetherald in refusing to comply with Commission's orders.

21 The Administrative Law Judge's attempts to condition Mr. Glaser's withdrawal upon
22 compliance with the discovery orders was impractical and in conflict with the Arizona Rules of
23 Professional Conduct. A lawyer shall not represent a client where the lawyer has been
24 discharged. *17(a) A.R.S. Sup. Court Rules, Rule 42, Rules of Prof. Conduct, ER 1.16.* Once

25 ³ As evidenced by Rule 37, Arizona R.Civ.Pro., a motion to compel and any sanction for failure to comply is directed
26 at the party refusing to produce. It is only when the lawyer advises the party not to produce that the lawyer is subject
to sanction.

1 discharged there was nothing Mr. Glaser could or should have done about Mr. Wetherald's failure
2 to produce data to the Commission staff.

3 To base the revocation of a lawyer's pro hac vice status on the failure of his client to
4 produce documents prior to or after the lawyer has been discharged by the client is unfair and
5 illogical. So long as the lawyer is not complicit in the refusal to produce discovery, the lawyer
6 cannot be faulted for the client's refusal to produce the discovery. This ground should not be
7 used as a basis for a Commission decision adverse to Mr. Glaser. A revised proposed Paragraph
8 72 is at Exhibit C.

9 CONCLUSION

10 The proposed Findings of Fact do not comport with the evidence in the Commission's
11 files regarding the issue of Michael Glaser's understanding of Frank Tricamo's knowledge of the
12 complaint, these proceedings and Tricamo's consent to Mr. Glaser's representation. There is no
13 evidence before this Commission that would suggest that Michael Glaser did not have the right to
14 rely on Mr. Wetherald's representations, which are affirmed under oath, that Mr. Tricamo knew
15 of the complaint, was aware of the proceedings and consented to the representation by Mr.
16 Glaser. Thus, the Commission should not approve the Findings of Fact in Paragraph 70, nor
17 should it on that basis order the revocation of Michael Glaser's pro hac vice status or the
18 reporting of his activity to the Colorado State Bar or the State Bar of Arizona.

19 The failure to appear at a pre-hearing when ordered by the client not to appear and after
20 having been discharged by the client does not, standing alone, constitute sufficient basis for the
21 revocation of pro hac vice status or the reporting of that activity to the respective state bar
22 authorities. Absent evidence in these docket proceedings that the Commission either has entered
23 such orders in the past under similar circumstances or has adopted a policy with respect to the
24 failure to appear deprives the Commission of a basis upon which it fairly can issue such an Order.

25 The failure of a lawyer's client to comply with a discovery request, especially after the
26 lawyer has been discharged, is not actionable. Absent a showing that the lawyer has been

1 complicit in the client's failure to comply with discovery requests (and there is no showing in
2 these docket proceedings in that regard), the Commission is without a basis to order Mr. Glaser's
3 pro hac vice status be revoked or that his activities be reported to state bar authorities.

4 For all of these reasons, Mr. Glaser takes exception to the Proposed Findings of Fact in
5 Paragraphs 70, 71 and 72 and the proposed Order revoking Mr. Glaser's pro hac vice status and
6 reporting this Commission's decision to Bar authorities.

7 RESPECTFULLY SUBMITTED this 30 day of April, 2004.

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12 By 

Edward F. Novak

13 *Attorneys for Shughart Thomson & Kilroy, P.C. and*
14 *Michael Glaser*

15 ORIGINAL and 10 COPIES of the
16 foregoing filed this 30th day of
17 April, 2004, with:

18 Docket Control
19 ARIZONA CORPORATION COMMISSION
1200 W. Washington Street
Phoenix, AZ 85007

20 COPY of the foregoing served by
21 first class mail, postage prepaid, this
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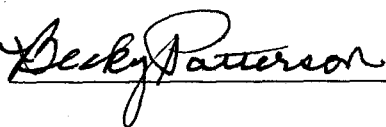
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EXHIBIT A

Proposed, Revised Paragraph 70

70. Mr. Glaser relied on Mr. Wetherald's statements as a basis for filing an appearance for Mr. Tricamo and Mr. Johnson. Mr. Tricamo claims to have known nothing about these dockets prior to June 2003. Mr. Wetherald's statements are contained in a sworn affidavit. Mr. Tricamo's denials came in an undated, unsworn letter.

EXHIBIT B

Proposed, Revised Paragraph 71

71. Prior to April 15, 2003, Mr. Glaser announced that he would likely be withdrawing. He also stated he would not appear at the April 15, 2003 pre-hearing. Mr. Glaser filed a Motion to Withdraw on April 14, 2003. Mr. Glaser was instructed by Mr. Wetherald not to appear on April 15, 2003. Mr. Glaser did not appear at the pre-hearing on April 15, 2003. Absent a Commission order to the contrary, Mr. Glaser was obligated to appear at the pre-hearing.

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EXHIBIT C

Proposed, Revised Paragraph 72

72. Mr. Glaser's failure to appear at the pre-hearing on April 15, 2003, causes this Commission great concern. It does not, however, standing alone and without other precedent, support punitive action against Mr. Glaser.